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ABSTRACT

The purpose of the paper is to provide an overview of legislation, federal and provincial, affecting Indian education in Canada. Throughout the paper the following developments are noted: under the British North America (BNA) Act, education was put under the jurisdictional control of the provinces while Indians were the responsibility of the Federal Government; the Indian Act now requires the Minister responsible to enter into agreements with the provinces with regard to education; the number of Indian children attending provincial schools has increased considerably over the last 20 years (98.5% of Ontario Indian children attending secondary school are in provincial schools); the dropout rate at the secondary school level is alarmingly high and indications are that Indian-run schools provide a marked improvement in the retention rate of Indian children at the secondary level. Two key problems summarized concerning law, education and the Indian are, first, the law over the years has been applied differently and unfavorably to Indians in regard to education; secondly, legislation affecting Indian education has been written by white men from their point of view, ignoring the cultural perspective of the Indian people. (ERB)

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Report on Legislation
on
INDIAN EDUCATION

BY
R. CHARLES

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ONTARIO INDIAN EDUCATION COUNCIL

Toronto, Ontario January, 1981

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REPORT
ON
LEGISLATION ON INDIAN EDUCATION

Roger Charles
Ontario Indian Education Council
Toronto, Ontario
January 1981

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FOREWORD

The purpose of this report is to provide an overview of legislation, both federal and provincial, that affects Indian education. It is hoped the report will be a useful reference work to education officers of bands and interested individuals who would like a short, simple work to help them understand the legal framework under which the education of Indian children operates.

I would like to acknowledge the invaluable source of material provided by Gail Hinge in her work, Consolidation of Indian Legislation.^{*} I would also like to thank Dr. E. R. Daniels and Paul Williams for their help in reviewing the original draft and providing constructive criticism. Finally, I would like to thank Charlene Martin for her unstinting efforts in support of this project.

^{*}Hinge, Gail Consolidation of Indian Legislation, Volumes I, II, III
(Ottawa: Queen's Printer, 1976)

INTRODUCTION

"We want education to give our children the knowledge to understand and be proud of themselves and the knowledge to understand the world around them."¹

The National Indian Brotherhood in its policy paper, has striven for a number of years to promote Indian control of Indian education. The idea of Indian control grows out of the failure of the present educational system to satisfy the needs of Indian children. Although there is some debate (see following chapter) on who is ultimately responsible for Indian education, it is generally acknowledged that it is the federal government, especially as a consequence of the post-Confederation treaties and the Indian Act. Thus the aforementioned policy paper is directed towards the federal government in the hope that both future legislation and practice will be intended to increase Indian control of Indian education. Bearing this in mind, this report details the present legislation affecting Indian education. However, before proceeding with the study of the legislation, it is important that the reader have a clear idea as to how Indian children perform in the present educational system. A system which is alien to many Indian children but who are forced to attend because of laws, some of which are over a hundred years old.

Across Canada Indian participation in elementary schools is close to the national level. As for university, although attendance has increased 10 times in the last 10 years, the participation rate is only half of the national one. More distressing is that retention through to the end of secondary school is about 20 percent compared to a national rate of 75 percent.² A report by the Department of Indian Affairs detailed the present situation of status Indians. Some of the highlights are, an increase in schools in Indian communities operated by Indian bands; the proportion of Indian teachers on staff with Federal schools has stabilized between 25 and 30 percent after having tripled since 1966; there has actually been a decline of 3 percent in constant dollars in per student cost for federal and joint schools; and although the participation level at university both proportionately and numerically has increased considerably, it remains at only one half the national level. "This is probably a reflection of the number of Indians who do not complete the secondary level."³

This last statement is quite central to a number of issues relating to Indian education. One is the growing proportion of Indian children in provincial schools,

"The proportion of children enrolled in provincial schools outside of Indian communities has increased in every region, reflecting the difficulties in providing more senior and specialized facilities in small Indian communities, but also resulting in lower participation levels."⁴

As the survey reports, there is an apparent correlation between increased enrollment in provincial schools and a lower retention rate in secondary schools. Obviously any attempts to increase enrollment at the post-secondary level must first solve the drop-out rate at the secondary school level. As the Survey states,

¹ National Indian Brotherhood, Indian Control of Indian Education (Ottawa, Mail-O-Metic Printing Co., Ltd., 1972) page 1

² DIAND, Indian Conditions, A Survey (Ottawa: Queen's Printer, 1980) page 47

³ Ibid., page 53

⁴ Ibid., page 50

"Lower participation in secondary schools, particularly among the 14-17 age group, may partially reflect the current inability of provincial schools to help Indian students adjust to a new environment."⁵

This rather bland statement has been the crux of the problem which Indians themselves have been stating for years,

"The educational system, if it is to succeed, must be based upon the Indian child's environment and then expanded to provide the knowledge of the culture or society that surrounds him."⁶

More recently the National Indian Brotherhood's advocacy of Indian control of Indian education asserts the same position. Moreover the Survey implicitly supports this position by stating,

"Indian control of education and accessibility appear to be influencing factors in secondary participation. In the limited areas where bands have assumed responsibility for secondary education and, to a lesser degree, where provincial schools are close to Indian communities, the retention rates are higher."⁷

The desire on the part of Indians to take control of their own education, the increasing role of the provinces in their education and the legal responsibility of the federal government to provide the facilities and/or financial support for Indian education have created a triangular relationship which is ill-defined within the present legislative framework. The chapters that follow attempt to outline this framework.

The Indians of Ontario represent a microcosm of the total Canadian picture with regards to education. A study done on Ontario Indians⁸ found that although enrollment had increased 24 percent from 1966 to 1977, the retention rate in secondary schools at 38 percent was only one-half of that for all students in Ontario. Nevertheless it was still 10 percent higher than the over-all Canadian average.

Other similarities existed but again to a greater degree than the national average. For example the overwhelming majority of students attended provincial high schools (98.5% in 1977) creating an overall attendance in federal schools of 51 percent, compared to 39 percent nationally.⁹ Once again the report echoes the findings of the Survey,

"The retention rate of Indian students through Grade 12 is a key to their future educational development. Unless a substantial upward movement occurs from the present plateau at 38 per-cent, it appears that the present retention rate will limit the 'stock' of potential recruits for post-secondary education and training."¹⁰

⁵ Ibid., page 57

⁶ Kaegi, Gerda, The Comprehensive View of Indian Education (Indian Eskimo Association, March 1972) page 9

⁷ Op. cit., page 56

⁸ DIAND, A Demographic, Social and Economic Profile of Registered Indians in Ontario (Ottawa: Queen's Printer, October 1979)

⁹ Ibid

¹⁰ Ibid., page 30

The methods by which "substantial movement" in retention rates in secondary schools in Ontario can be achieved are again very similar to those advocated at the national level. The Task Force on the Educational Needs of Native Peoples of Ontario concluded that among other objectives,

"The education of Native people should reinforce their culture and their identity (as they define them) rather than destroying them."¹¹

The Task Force therefore made a number of recommendations, one of which was,

"Governments (both Federal and Provincial) adjust their policies and practices so that Native peoples are involved in all phases of the education of their children and are in a position to assume more responsibility for the provision of that education."¹²

The foregoing recommendation in concert with the many others strongly parallel the position taken by the National Indian Brotherhood on Indian control of Indian education. The conclusion by the survey on band-controlled schools enhances the viability of Indian control of Indian education as the only real option to the present unsatisfactory system both in Ontario and across Canada.

¹¹Summary Report of the Task Force on the Educational Needs of Native Peoples of Ontario, Department of Education (Toronto: Queen's Printer, 1976)

¹²Ibid., page 21

The summer of 1980 may be best known for the Quebec referendum and the debate on the patriation of the constitution, two subjects not unrelated. It is beyond the scope of this report to discuss the broader constitutional questions which are absorbing so much time of the present federal government. However it is important to be aware of the present political situation because of the possibility that fundamental changes in the B.N.A. Act may arise which could very well affect the status of Indians and by extension Indian education.

"Almost all the inherent 'native rights' which Canadian Indians and Inuit retain today are derived from their original possession of the North American continent. It is this historical fact and the due recognition which Canadian and English law and policy have given to the principle that native people have a right to retain possession of or be compensated for the loss of their aboriginally held land that underlies and explains the complex legal theory of aboriginal rights, the emergence of most of the Indian treaties, and the continuing and justified demands of native peoples for the satisfaction of outstanding claims."¹³

Our concern, education, must be viewed as an integral part of the compensation and outstanding claims referred to in the above quote since the issues arise from the treaties, some of which have specific commitments to education. Moreover since the treaties are more fundamental to the Indian people than the B.N.A. Act and in some cases precede the latter, they are included in this chapter on the assumption of equality and importance.

It is not the purpose of this paper to do an in-depth explanation of the legal status of treaties, suffice it to say,

"In law, the term 'treaty' may refer to two conceptually related, yet analytically distinct, kinds of documents. The most common contemporary legal usage of the term concerns compacts or agreements 'between two or more independent nations.' In private law 'treaty' refers to the discussion of terms which occurs immediately prior to the making of a contract. In older popular usage, treaty meant the negotiation of any agreement or contract, but it is clear that the agreements entered into with the Indians are neither international treaties nor simple private contracts, and while certain similarities exist between the treaties and legislative enactments, this is also somewhat inappropriate."¹⁴

The authors of the above quote state that whatever else, "both the Government and the Indians entered into the various treaties with the intention of creating mutually binding obligations."¹⁵

Although Treaties concluded between the Federal Government and the Indians cover approximately half of the native population of Canada, this report will concentrate on those treaties covering Ontario. They are as follows: Royal Proclamation Exempted Area; Upper Canada Pre-Confederation Treaties; 1850 Robinson-Superior Treaty; 1850 Robinson-Huron Treaty; Treaty 3 (1873); Treaty 9 (1905); Treaty-Chippewas (1923); Treaty-Mississaugas (1923).

¹³Cumming, Peters, Mickenberg, Neil (editors) Native Rights in Canada (Toronto: General Publishing Company 1977) page 3

¹⁴Ibid., page 54 see chapter nine for a complete discussion

¹⁵Ibid., page 58

The Proclamation of 1763 has the force of statute in Canada and is sometimes perceived as the "charter of Indian Rights."¹⁶ However it is concerned with ownership of land and the notion of aboriginal rights rather than any specific commitment by the whites to undertake the education of the Indian population.

There were various other pre-Confederation treaties, but as with the Royal Proclamation they were concerned with the cession of land rather than having any reference to education.

The Robinson-Superior and Robinson-Huron treaties are considered forerunners of the numbered treaties. As with the previous treaties, no mention of any commitment to education is made. However Cumming and Mickenberg point out that these treaties established the concept of open and public meetings, the system of reservations which could only be sold with the consent of the Superintendent General of Indian Affairs and the system of annuities. In effect, it formalized the paternalistic approach of the whites which was given further impetus with the B.N.A. Act that followed.

The impetus for paternalism was established by section 91 (24) which gave legal competence to the Federal government for Indians and Indian lands. However within the context of education, there arises some question as to a specific head of provincial authority. One writer states,

"Because legislative jurisdiction over the education of Indians is possibly within the federal government, it does not necessarily follow that this fact alone creates rights in Indian peoples to a federally-organized education scheme."¹⁷

Note that the author uses the term "possibly" indicating some debate as to jurisdiction of authority over the education of Indians. The point made here is further enforced by the following Department of Indian Affairs' statement,

"As a matter of practice, but not of legal obligation, the federal government has also assumed the cost of....elementary and secondary education."¹⁸

Here the key word is cost. Nevertheless it is unrealistic to divorce cost from the application of education. Thus we have expressions of doubt concerning the legal obligation to maintain an educational system for Indians using the B.N.A. Act as the legal base. This position is utterly refuted by the Indians themselves,

"The Federal Government has legal responsibility for Indian education as defined by the treaties and the Indian Act. Any transfer of jurisdiction for Indian education can only be from the Federal Government to the Indian Bands."¹⁹

¹⁶ Ibid., page 30

¹⁷ Foley, Peter (Legal Rights of Indian People in Education) Indian Education in Saskatchewan Saskatoon, Federation of Saskatchewan Indians, Volume I 1973, page 1

¹⁸ Indian Conditions: A Survey op. cit., page 104

¹⁹ Indian Control of Indian Education op. cit., page 5

As has been previously stated, the pre-Confederation treaties made no commitment for the education of Indians. The numbered treaties came after Confederation, however, made specific reference to their education including the cost of maintenance of schools and the salaries of teachers. Paul Williams, a lawyer for the Union of Ontario Indians in Toronto, says the following on treaties:

"As for treaties dealing with education in Ontario, Treaty Three and Treaty Nine are the only major land treaties that state anything directly on the subject. But this is not to say that earlier treaties did not make provision for education. Often what was promised orally was not placed in writing; as well, neither Europeans nor Indians had strong ideas about the nature and structure of formal education in the seventeenth and eighteenth centuries. The Saugeen Treaty of 1836 mentions that 'efforts will be made to civilize you', but the bands consider this Treaty invalid for a number of reasons, including the vague nature of that statement. The presents that were promised under the Treaty of Niagara of 1764 were cut back by the government beginning in the early 1830's. One of the means of reducing the presents was the proposal to a number of southern Ontario bands that they should have the money that would have been used for presents applied to education instead. Records on this are incomplete, but the offer was made, and the presents were discontinued."

The Indian Act, which is dealt with more fully in the next chapter, also provides for Indian education. The Survey* provides an overview of the commitments undertaken by both the Federal Government and the Indians in the various acts and treaties by which they are mutually affected. Once again there is a clear commitment to education on the part of the Federal Government.

Since it was earlier shown that the treaties were entered under the assumption of mutually binding obligations notwithstanding their legal status, the position as expressed by the N.I.B. seems entirely in the right. On the other hand, the claim that there was no legal obligation on the part of the Federal Government to bear the cost of education seems to be fundamentally incorrect.

* As to the Survey, the Union of Ontario Indian states the following,

"the report includes a number of statements on 'treaties and legislation.' The statements are no doubt intended to be taken as facts. But the 'treaties' mentioned are the 'numbered treaties', and the many Treaties we rely on from 1664 onward are not included.

As for the Royal Proclamation of 1763, the Report says its effect was that it 'nullified Indian claims to sovereignty and independence.' The Royal Proclamation contains nothing of the sort. Nor has the Government said anything along these lines before.

The Indian Act is presented as if it had not changed in over a century -- in fact, the 1876 Act is presented alongside the contents of the 1951 Act."

From D.I.A. Report: Nothing New, Ontario Indian, Volume 3 No., 80, August 1980. page 15

THE INDIAN ACT AND ORDERS-IN-COUNCIL

"Foreasmuch as most of our colonies do border upon the Indians, and peace is not to be expected without the due observance and preservation of justice to them, you are in our name to command all Governors that they at no time give any just provocation to any of the said Indians that are at peace with us....do by all ways seeks fairly to oblige them and....employ some persons, to learn the language of them, and....carefully protect and defend them from adversaries....more especially take care that none of our own subjects, nor any of their servants do in any way harm them."²⁰

This 1670 legislation by the British Parliament, along with later instructions to Governors, according to Mr. Moore, established the general guidelines of future British Indian policy:

- a) "protection of Indian people from unscrupulous settlers and traders;
- b) introduction of Christianity later becoming the movement to 'civilize Indian people';
- c) an 'activist' role for the Crown as a protector of 'Indians.'²¹

To the extent that the British Parliament did not want to antagonize the Indians, there existed a certain respect and equality for the latter. Mr. Moore further adds that until the end of the 1812-14 war, the British government's need to have the Indians as allies maintained a certain equality."²²

After the war and the end of the military threat, Indian policy was concentrated in the aforementioned (b) or the "civilizing" of the Indian. It is here where our report must concentrate.

Although various religious groups had been involved in the education of Indians since the arrival of the whiteman²³, it was with the Bagot Commission of 1844 that a serious governmental approach to the question of Indian education was advanced.

Yet the Commission's recommendations regarding education were not transformed into law for many years to come. This is not to say that action was not taken on the recommendations. In 1844 Egerton Ryerson, Superintendent of Education for Upper Canada established two industrial schools for Indians in 1848 and 1851 respectively. They subsequently failed for a variety of reasons, including lack of funds and poor attendance by children.²⁴

As is stated in the previous chapter, the establishment of Confederation through the B.N.A. Act provided federal legislative power over "Indians, and lands reserved for Indians" under section 91 (24) of the Act.

²⁰ Moore, Robert et al The Historical Development of the Indian Act DIAND (Ottawa: Queen's Printer, August 1978) page 2

²¹ Ibid

²² Ibid

²³ Kirkness, Verna "The Education of Indians and Metis" in Indians Without Tipis Ed., J. Kirkness and B. Sealey (Winnipeg: William Clare, 1973) page 140

²⁴ Scott, Wendy Native Education and the Church An unpublished paper.

In 1876, the Indian Act was passed into law. It can be said that the authority of the act arises from the above section of the B.N.A. Act. Its purpose was to consolidate all previous legislation affecting Indians. Mr. Moore comments, "most of the changes in the Indian Act during the Post-Confederation period derived from a belief that Indians could be integrated with the majority community. Legislation changes reflect the prime interests of 'white' society, rather than those of Indian people."²⁵

Perhaps the clearest example of this desire for assimilation is contained in the articles relating to enfranchisement. The concept of enfranchisement of Indians was first put into law in 1857 with an Act for the Gradual Civilization of the Indian Tribes. Again according to Mr. Moore, enfranchisement was presented to the Indian populace as a reward for adopting the lifestyle and customs of 'civilized' citizens.²⁶ This attitude towards enfranchisement was further honed in 1869 with the Enfranchisement Act.

For the purpose of this paper, however, the important point to be noted is section 99, paragraph (1) of the Indian Act (1880) which permits any Indian who has obtained professional status, that is a doctor, professor, lawyer, etc., to be granted enfranchisement upon petition to the Superintendent General. The irony of this educational requirement is that the only reference to a government commitment for education in the Indian Act of 1867 is section 63 where it states, among other things,

"The Chief or Chiefs of any band in council may frame, subject to confirmation by the Governor-in-Council, rules and regulations for the following subjects viz:

6. The construction and repair of school houses, council houses and other Indian public buildings."²⁷

Thus, notwithstanding the Bagot Commission, the various missionary schools and the government's device to see the Indians "civilized", the federal government made no real provision to assist in Indian education.

The Indian Act of 1876 concerned itself mainly with the problems of lands and the Indians. However over the next decade the act underwent major and minor revisions. By 1880, the Chiefs of the bands were permitted, subject to limitation, to determine the religious denomination of the teacher working on the reserve. By 1884, an amendment to the Indian Act made it compulsory for children from six to fifteen to attend school. In 1886, amendments to the Act permitted the Governor-in-Council to invest monies obtained from the sale of Indian lands as he saw fit, which included the construction and repair of schools. Eight years later and more important to our topic of concern, an amendment provided for the establishment of industrial schools with compulsory attendance on the part of Indian students. Moreover, Mr. Moore informs his reader that the Department of Indian Affairs created four additional branches, one of which dealt with native schools.²⁸ Obviously the desire to assimilate the Indian people through the educational process was becoming a greater concern for the Canadian Parliament.

²⁵Op. cit., page 51

²⁶Ibid., page 28

²⁷Ibid

²⁸Op. cit., page 73

Mr. Moore comments on the 1894 amendments,

"Voluntary attendance at school particularly in the North-West had been minimal and the new legislation enabled the Department to educate Indian children without either their consent or their parents. The Governor-in-Council did not hesitate to implement the new provisions. An Order-in-Council of November 1894 proclaimed regulations concerning industrial schools, compulsory attendance and support of Indian children."²⁹

The Indian Act of 1906 incorporated a considerable legislative expansion with respect to education. However this expansion reflects an attitude on the part of the Department and its Superintendent-General, Clifford Sifton who is quoted as saying that an Indian could not "go out from school, making his own way and compete with the white man (because) he (neither) had the physical, mental (nor) moral get-up to enable him to compete."³⁰ In effect, in conjunction with other amendments of the act, the Department had embarked on forced assimilation of the Indian populace; a main channel for this process being perceived as education. This attitude on the part of the Department lasted for much of the first half of the twentieth century. For example, in 1920 Duncan Campbell Scott, Deputy Superintendent-General of Indian Affairs stated,

"I want to get rid of the Indian problem....after one hundred years, after being in close contact with civilization it is enervating to the individual or to a band to continue in that state of tutelage, when he or they are able to take their position as British citizens or Canadian citizens, to support themselves, and stand alone. That has been the whole purpose of Indian education and advancement since earliest times."³¹

The amendments of 1920 empowered the Governor-in-Council and/or the Superintendent General to control financing, construction, standards and attendance of all Indian children. In short, the government by enacting legislation to assume total control over Indian education hoped thereby to assimilate the Indian populace that much quicker.

With the end of World War II, there was a fundamental change of attitude on the part of Parliament insofar as it was now willing to listen to Indians, and how they viewed their future. As well, the Parliament no longer saw Indians as a problem which in the fullness of time and the application of legislation would disappear."³²

The final concern in this chapter is the present legislation affecting Indian education, that is the Indian Act of 1970 with amendments. There is very little difference between the present legislation in education and that of the Indian Act of 1951 which heralded a change in outlook on the part of the Minister and his department.

Perhaps, one of the more interesting aspects of the legislation is from 1951 on, the opening section concerning schools permits the Minister on the authorization of the Governor-in-Council to enter into agreements on behalf of her Majesty for the education in accordance with this Act of Indian children, with (a) the government of a province...."³³

²⁹ Ibid., page 98

³⁰ Ibid., page 98

³¹ Ibid., page 114

³² Ibid., pages 149-152

³³ Hinge, Gail, Op. Cit., page 456

The 1927 Indian Act and those preceding it never stipulated that the Governor-in-Council need enter into agreements with the provinces³⁴ although it may have been an unstated mutual understanding.

However one cannot help feel, in light of the present constitutional debate, that the incorporation into the act of agreements with the provinces reflects a growing assertiveness on the part of the latter to assert their jurisdictional power over education. This may also have arisen as more Indian children were going into the provincial educational system rather than remaining on reserve schools. The next chapter deals more fully with the provincial/federal debate, and how it affects Indian education.

Another aspect of the present legislation as compared with the 1927 Act, is an increase in detail concerning attendance. For example, paragraph 119 (5) states "a child who is habitually late for school shall be deemed to be absent from schools," or paragraph 120 "an Indian child who (a) is expelled or suspended from schools, or (b) refuses or fails to attend school regularly, shall be deemed to be a juvenile delinquent within the meaning of the Uvenile Delinquents Act R.S., c 149, s 119." Such legislation is not present in the earlier act, even though fines and jail terms were available (and still exist) for parents who were negligent in keeping their children at school.

For the purpose of greater local control of Indian education, sections 69 and 83 of the Indian Act are quite important. As Dr. Daniels says,

".... under section 69, the Governor in Council may permit a band 'to control manage or expand in whole or in part its revenue monies' and under section 83 the Band Council, when declared to be in an 'advanced state of development' may make by-laws relating to 'the appropriation and expenditure of monies of the band' and 'the appointment of officials to conduct the business of the Council.'"

These two sections have had the effect of making it possible for many Band Councils to become actively involved in school matters within the context of the powers already established.³⁵

This is significant in that the Indian Act of 1951 actually reduces the amount of freedom the Chiefs of a Band have,³⁶ restricting them only to the determination of the denomination of the teacher (121,2). In the past they had control of the construction and maintenance of schools, inspection of schools, framing of rules and regulations etc. However, not withstanding the limitations imposed by the latest Act, sections 69 and 83 outlined above have in fact permitted a much larger and growing role for the bands in determining their educational needs. It is these sections which are the basis for the local control of Indian education which is so actively sought after by the Indian people.

Before ending this chapter, it is important for the reader to recognize the fact that although the Department of Indian Affairs justifies its existence and its actions by virtue of the B.N.A. Act and the Indian Act, many of its actions are not clearly grounded in these acts. To get around the limitations of the acts, Orders-in-Council are used. To be fair, there may not be any malicious intent

³⁴Ibid., page 247

³⁵E.R. Daniels, The Legal Context of Indian Education in Canada, an unpublished doctoral thesis for the University of Alberta, Edmonton, 1973 pages 110-111

³⁶Ibid., pages 16-17

by civil servants to circumvent the acts, but the volume of "subordinate legislation" increases the probability that the Department might be breaking the law. Dr. Daniels describes Orders in Council as follows:

"When the Governor in Council is given the legislative authority to develop his share of any resultant subordinate legislation, he does so by the issuance of Orders in Council (the Council in question being the Privy Council). These Orders in Council do not mean that the Governor General initiates subordinate legislation; they indicate that the personal representative of the Crown endorses such subordinate legislation submitted to him by the Minister. The Minister in turn has these Orders framed by, or upon the advice of his senior civil servants. The Orders themselves enable the further development of that legislation, approved by Parliament, which has already received the Royal Assent.

"In the case of Indian education, the Governor-General has the direct authorization to issue Orders in Council in respect of section 114 (1) of the Indian Act (R.S., c. 149). concerning agreements with provincial and territorial governments, public and separate school boards, and religious or charitable organizations. He may also directly rule against the establishment of separate schools on Indian reserves, under section 122, if the number of children involved is too small. Indirectly, he may issue Orders in Council that affect the provision of educational services under section 69 (Band management of funds).³⁸

It should be remembered that for the potential evil inherent in Orders in Council there is also potential for good. Much of the growing involvement of Indians in their own education is a result of Orders in Council as permitted in section 69 of the Indian Act. For example, Indian control of the Blue Quills school in St. Paul, Alberta was established by Order in Council P.C 1970-2/2177³⁹. The Blue Quills school can be viewed as a major turning point in attempting to gain Indian control of Indian education.

Since the amendments of 1854, the federal government has continually tried to legislate the attendance of Indian children at school through threats of fines and jail terms. The scope of the legislation has expanded continuously to the present day, reflecting an obvious frustration on the part of the government; but also, by extension, a failure on the part of the school system to instill an interest or a sense of relevance to the Indian children. The latter, as shown in the opening chapter, is supported by statistics.

The next chapter focuses on provincial legis'lation, and more specifically with that of Ontario. A few brief comments on the conflict between the federal and provincial governments may be useful, since the Indian Act stipulates federal control of Indian education even though education is constitutionally a role of the province.

³⁷ Ibid, page 118 see pages 22-23, 117-142

³⁸ Ibid., page 124

In earlier chapters we have noted the following developments: under the B.N.A. Act, education was put under the jurisdictional control of the provinces while Indians were the responsibility of the Federal Government; the Indian Act now requires the Minister responsible to enter into agreements with the provinces with regards to education; the number of Indian children attending provincial schools has increased considerably over the last 20 years (98.5% of Ontario Indian children attending secondary school are in provincial schools); the drop-out rate at the secondary school level is alarmingly high and indications are that Indian-run schools provide a marked improvement in the retention rate of Indian children at the secondary level.

The foregoing indicates the confusion of three different authorities having overlapping responsibility for one objective, the education of Indian children. Nonetheless it is obvious the provincial authorities play a crucial role in the present arrangement.

In this chapter, we are most concerned with Ontario's legislation affecting Indian education. Since each province is its own master over education, legislation may differ from one province to the next, but we will use Ontario as the model, even if it is not possible to make it universally applicable.

The Indian Act of 1951 and thereafter required the Minister responsible for Indian Affairs to enter into agreements with the provinces for the education of Indian children. On the other hand, originally in the Department of Education Act and the Public Schools Act, the provincial government was concerned with providing access to Indian schools in these areas where the Indian school was the only one around. In the Public Schools Act of 1950 there is a reference to the Minister of DIA. This is deleted by the Public Schools Amendment Act of 1964. This could be interpreted as a realization that the various Indian bands were taking greater control of the schools on their respective reserves, and it was therefore necessary to deal with them instead of or along with the Minister responsible for Indian Affairs.

In the School Administration Amendment Act of 1967 the provincial government permits a board to "enter into an agreement with the Crown in right of Canada for a period specified in the agreement to provide accommodation and tuition for the maximum number of Indians agreed upon." In short, the exact opposite of the preceding paragraph where the Ontario government would arrange for the use of Indian schools.

The other element involved in the Amendment Act is the right of a representative, based on the recommendation of the council of the Indian band concerned, to be on the local school board to present and protect the interests of the Indian pupils served by the board. The following pieces of legislation, the Schools Administration Act, The Schools Administration Amendment Act further define the conditions under which Indian children may attend provincial schools. Besides securing financial commitments from the Federal Government and stipulating when a member of the board may be a representative from the Indian band (when Indian attendance is 10 percent or more of average daily attendance), the law prevents boards from entering into agreements for special services for Indian pupils where they are not already provided for its resident pupils unless the Federal Government pays for the cost of such services. This is an important subsection as it concerns obtaining funds necessary for such services as Teaching English as a Second Language, which is essential to Indian children in many parts of Ontario, especially in the north.

Thus the necessity of special educational services for Indian children can be thwarted by a lack of such services in a provincial school and/or an unwillingness on the part of the Federal Government to provide the necessary funding.

Section 162 of the Education Act of 1974 consolidates all the legislation discussed above and in some cases adds specificity to it; for example the limits of representation by a member of the school board appointed by the band council. According to David Ferguson, Director of the Policy Liaison and Legislation Branch of the Ministry of Education of Ontario, there have been no fundamental changes to the Act since it became law. Consequently, it is obvious that legislation affecting Indian education remains limited for the most part to financial arrangements for the admission of Indian children into provincial schools and to a lesser degree, to the reverse. Such issues as Indian control of Indian education seemed to be limited, legislatively speaking, to representation on school boards where the number of Indian children at the school justifies it.³⁹

³⁹ It is important to remember that the law by itself does not automatically guarantee Indian representation on local school boards. Cases have been reported to the Council where bands have had a legal right to representation on a school board but are not represented. It is up to the band to be aware of its legal right and to fully exercise it.

The events which have been taking place in Ontario, have also been taking place across the country. These are the increase in Indian student enrolment in provincial schools and the delegation of responsibility for Indian education away from the Federal Government to the provincial government. As Mr. Daniels notes,

"However, none of these developments could have taken place if the federal government alone was provided with the opportunity to take advantage of provincial educational services. There had to be similar enabling legislation passed by the provinces before such a confluence of education streams could occur."⁴⁰

As we have already seen, Ontario did enact legislation to accomodate the new realities, but such legislation came after the amended Indian Act.

E.R. Daniels points out that British Columbia had legislation prior to the Indian Act of 1951 which authorized "The Minister of Education or local School Boards... to enter into an agreement with the Department of Mines and Resources - Indian Affairs Branch for the education of Indian children in the public schools of the province."⁴¹

However British Columbia was always a unique case when it came to Canada's indigenous people.⁴² The only conclusion one can draw from such authorization as noted by Mr. Daniels is the provincial school system would more rapidly assimilate the provincial Indian population. Certainly the legislation from 1884 through to 1948 made it clearly illegal for any Indian to vote at school meetings related to school board affairs, even though the Indian may have been a householder, paying his rates and over twenty-one, the requirements of a voter. In short, taxation without representation. Thus it seems ironic that such legislation could exist at the same time the province strove to undertake the education of Indian children in its system. In fact, it has only been fairly recently that legislation allowing Indian ratepayers to vote for members on school boards has been passed.

Moreover the establishment of a Council of Public Instruction which appears to have been an attempt to suppress a "community under communal or tribal conditions" was probably only prevented from exercising its authority over Indian bands because the latter were under federal legislative jurisdiction.

In the Public Schools Act of 1958, section 18, this same Council of Public Instruction was authorized to establish agreements with the Minister responsible for Indians for their education. In the same act, section 160, subsection 1, paragraph (d) authorizes with the approval of the provincial Minister, individual School Boards to make arrangements for the education of Indian children. Although the Act has been amended over the years, the intent and effect of provincial arrangements with the Federal government remains unaltered. In fact, Mr. Daniels states that British Columbia was the first province to establish a general agreement with the government in Ottawa on the education of Indian children. This was signed on November 12, 1963. Ontario, according to Mr. Daniels, has no such province-wide agreement.⁴³

⁴⁰Daniels, E.R., Op, cit, page 113

⁴¹Ibid

⁴²See Cumming and Mickenberg, Op, cit

⁴³Op. cit., pages 113-116

Unfortunately as all Indians know, how the law is applied and how it was intended are too often quite different. In the case of B.C., as noted before, local school boards had been given the right to make arrangements with the D.I.A. and the bands for the education of Indian children, subject to the approval of the provincial education Minister. It was this ministerial approval that was not forthcoming in too many cases that has reduced the potential value of the original agreement.

Alberta also has no province-wide agreement. However the School Act of 1970, section 160 is similar to these of both Ontario and B.C. in that it authorizes school boards to enter into agreements with the Federal government for the education of Indian children. Dr. Daniels says this legislation was originally passed in 1956, although stated somewhat differently, and made retroactive to 1952. Since then a large number of agreements have been signed.⁴⁴

Similar legislation was written into the School Act of Saskatchewan (section 3) (1), (J), and numerous local agreements have been in force since the mid 1950's.

In Manitoba the arrangement included the question of tuition fees. The original authorization was in 1954, allowing Board of Trustees to deal directly with the Federal government. Under the provisions of the Education Department Act, a province-wide agreement was created to cover the general education of Indian children; this became effective on January 1, 1956.⁴⁵

Mr. Daniels points out that New Brunswick also has a province-wide agreement in its revised School Act of 1966 which is similar to the previously mentioned agreements. He further adds that the Territorial governments provide full educational services to its native population. As to the other provinces

"with the exception of Newfoundland, appropriate local agreements exist with numerous School Boards to provide education for Indian children in provincial schools."⁴⁶

As for Newfoundland, until recently the government saw no need to enter into agreements either at the provincial or local level because it felt it had no Indians. Discussions are now being held between the Inuit, the Indians and the provincial government.

Those provinces which we dealt with specifically in this chapter, B.C. Saskatchewan, Manitoba, New Brunswick as well as Ontario are the only ones at present that have legislation enabling the Indian parents to sit on provincial school boards. Dr. Daniels comments "enabling legislation of that particular type (Indian parents on school boards), and its effectiveness seems to be reminiscent of the provincial scenes before Confederation."⁴⁷

The author has drawn freely from Mr. Daniels' thesis and is grateful. Nevertheless the work is nearly a decade old and some of the above statements may now be inaccurate. However from present research there is no indication of fundamental legislative change in the period lapsed.

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid

It should be noted that even though only five provinces have enabling legislation, legislation is not the only form in which representation can take. "In addition to the formal legal types of school board representation there are numerous situations where school boards and Indian bands have developed effective liaison and consultative mechanisms. These practices vary from types where the boards invites an Indian member to sit in all board meetings with full voting rights to other types where representatives of the Indian people meet as needed with the board to discuss mutual concerns."⁴⁹

⁴⁸ R. Bean A Survey of Indian Representation on Provincial and Territorial School Boards for the Manitoba Indian Brotherhood, 1979

Prior to concluding this work, it is worthwhile to see how education for Indians was undertaken in the U.S. The similarities are striking. Our source is Jesse Reiber and Associates summary of the Task Force V on Indian Education in the U.S. They state,

"The summary of the Task Force notes that education of Indian people has been a primary tool in instituting overall Congressional and BIA policies, specifically isolation and assimilation. Historically, materials and funds have been inadequate and curriculum has been devoid of Indian culture and values."

and,

"This historical situation has been one of a unique tension for Indian children wherein physical needs were met at the expense of family separation and cultural alienation."⁴⁹

The summary goes on to state,

"Although Indians view the federal role in education as a right and obligation, the federal government often encouraged state assumption of the Indian education responsibility."⁵⁰

The summary further adds that both federal and state governments were required to provide education for Indians. Moreover the state input into Indian education was high, thus a great influence on their education. To aggravate the situation, no federal monitoring and evaluation system existed, reducing the states' incentive to assume its responsibilities. As well, the Bureau of Indian Affairs and the U.S. Office of Education have different definitions of Indian for education purposes and neither have policies or guidelines concerning the quality of their education programmes. The summary suggests the possibility that the two government agencies may be operating independently of each other, without the necessary consultation for a unified position.

Although there is no Canadian equivalent to the U.S.O.E., the lack of policy guidelines, the inability to establish quality control for education, the shortage of funds and the often conflicting interests of the provinces and the federal government appear to be the very same in nature. It is disturbing to think that the assessment provided by the report on state participation in Indian education which is generally negative, is now being enacted in similar manner in Canada in terms of provincial involvement.

The report concludes, "overall Indian needs are promoted as a service industry rather than as a reinforcement or promulgation of Indian control."⁵¹ Thus the Task Force on Indian Education as reported in the summary seem to suggest that Indian control of Indian education is a desirable goal in itself. One can also conclude based on the American experience of state control of Indian education, that the provincial system will prove to be as ineffective as the original federal one. The only recourse being a far larger input by Indians into Indian education.

⁴⁹ J. Reiber and Associates, A collection of summaries of 13 Task Force Reports to the American Policy Review Commission, DIAND, 1976

⁵⁰ Ibid

⁵¹ Ibid

CONCLUSION

"It is a point of Common Law that parents are responsible for the manner in which their children are educated, this principle of law is not fully applied to Indian parents. Also, this focus of Common Law on the individual expresses a western cultural bias. In contrast, Indian cultural focus is on the group,"⁵² eg., the extended family, the community (band).

Mr. Couture has essentially summarized the two key problems of law, education and the Indian. The first is the law over the years has been applied differently and for the most part unfavourably to Indians with regards to their education. Second, which is actually an outgrowth of the first, is that the legislation affecting Indian education has been written by white men from their point of view, ignoring the cultural perspective of the Indian people. The result has been failure.

Indian control of Indian education starts from the Indian point of view, from their cultural experience and adapts both curricula and legislation from that point. Indications are that this approach has proved to be more successful than the traditional one. If progress is to continue, Indians must always be on guard against retrogressive legislation which could prevent further development of this noble goal.

⁵² Couture, Joseph, Secondary Education For Canadian Registered Indians Past, Present and Future a Commentary. (Ottawa: Queen's Printer, October 1979)

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